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Transparency and Third Party Participation in Investor-State Dispute Settlement

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A. Introduction

One of the biggest challenges in investor – State dispute settlement in the last decade has been the demand for greater transparency and the implementation of government initiatives responding to that demand. The need for enhanced transparency is so obvious to many contemporary observers that the only mystery is why it has taken so long to address this issue. The main explanation appears to lie in the strong influence of private commercial arbitration on the investor-State process. Clearly, there is nothing objectionable about confidential proceedings in the private arbitration context: the capacity to arbitrate in private is a significant advantage of such arbitration.[2] The ability to maintain the confidentiality of evidence and to settle claims on a confidential basis have been perceived as contributing to efficient and effective arbitration. It is therefore somewhat ironic that what was touted as one of the main advantages of commercial arbitration is now seen as a liability in the investor-State arbitration context.

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1 The views expressed in this paper are solely those of the author and not those of the Government of Canada. The author would like to thank Robin Hansen for her assistance in producing this document.

2 Confidentiality is widely cited by practitioners and arbitration associations as a primary advantage of arbitration. *E.g.*, INTERNATIONAL COURT OF ARBITRATION, INTRODUCTION TO ARBITRATION: ADVANTAGES OF ARBITRATION, *at* http://www.iccwbo.org/court/english/arbitration/introduction.asp. Confidentiality is also protected under the International Chamber of Commerce's Rules of Arbitration. *SEE* INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE app. I art. 6 & app. II art. 1 (Jan. 1, 1998), *at* http://www.iccwbo.org/court/english/arbitration/rules.asp.

B. What brought this about?

Much of this change is attributable to the environment in which most governments operate. Citizens have instant access to overwhelming amounts of information through the internet, television, radio and print media. In turn, citizens increasingly are challenging their governments and asking for credible explanation of, and justification for, government action. Citizens also appear to have become more litigious, using adjudication as a mechanism to challenge government action. This is true both domestically and in the investor-State context. For example, more than two-thirds of known investment treaty arbitrations have been filed in the last four years (since the beginning of 2002).[3] Further, the subject of investor-State arbitration is "measures", which by definition are what government does with public funds to address questions of public policy.[4] Such arbitration is public by its very nature and needs to be accessible to the public. Satisfying the demand for information about, and access to, investor-State dispute settlement has become vital to assuring its credibility and its continued viability. This has been acknowledged (albeit in varying degrees) by most States offering investor-State arbitration in their investment treaties. The real challenge is the pragmatic one of how to achieve greater transparency.

C. Transparency initiatives to date

The initial advances in transparency were achieved mainly on an *ad hoc* basis, many in the context of NAFTA Chapter 11. The main *ad hoc* mechanisms enhancing transparency have been (1) tribunal decisions; (2) formal Notes of Interpretation or declarations by the State Parties to the treaties; and (3) practice of the relevant arbitral institutions. These *ad hoc* mechanisms were often used to clarify what might not be obvious on the face of the treaty or the applicable rules. In rare instances, for example with respect to the question of open hearings in arbitrations governed by UNICTRAL Article 25(4)[5], *ad hoc* tools were used to moderate what was dictated by the applicable rules.

More recently, transparency initiatives have been memorialized as clear treaty requirements. For example, the 2003 Canadian Model FIPA and the 2004 U.S. Model BIT address transparency expressly and in detail.[6] A similar trend can be observed in the DSU negotiations at the WTO where various transparency provisions have been advanced by State Parties. It seems preferable to ensure transparency through clearly expressed treaty obligations, rather than through *ad hoc* mechanisms. In particular, this ensures that transparency applies to all participants in the same way (assuming symmetrical obligations are expressed) and that all parties know what to expect in advance of the process.

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3 UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 4 (2005), UNCTAD/WEB/ITE/IIT/2005/2, at 2, *available at* http://www.unctad.org/en/docs//webiteiit20052_en.pdf.

4 The NAFTA definition of measure is found at Article 201: "measure includes any law, regulation, procedure, requirement or practice". North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, 639 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

5 Report of the United Nations Commission on International Trade Law, 21st Sess., Supp. No. 17, at 34-50, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL Rules], *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

6 US Model Bilateral Investment Treaty, November 2004, arts. 28-37 *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf; *See also*, Canada's Foreign Investment Protection and Promotion Agreement Model, 2003, arts. 20-47 *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf

D. Specific initiatives

i. Open hearings

Perhaps the most significant initiative to date has been the movement toward open hearings. The applicable rules in the NAFTA context made this somewhat challenging. In particular, Article 25 (4) of the UNCITRAL Arbitration Rules requires both disputing parties to consent to opening the hearings.[7] Article 39 (2) of the ICSID Additional Facility Rules is more nuanced, giving the tribunal discretion to determine who will be present at hearings with consent of the parties.[8] In practice, the NAFTA Parties have insisted on open hearings on a case-by-case basis. In addition, in October 2003 Canada and the United States publicly stated their intent to consent to open hearings in every case.[9] Mexico joined this consensus in July 2004.[10] As a result, virtually all Chapter 11 hearings are now open to the public. While in reality few people attend these hearings (perhaps a refection of how technical and dry the proceedings can be!) the opportunity to attend exists and is a significant achievement.

From a logistical perspective, open hearings have been accomplished smoothly through the good offices of the ICSID Secretariat. The ICSID practice has been to set aside a separate room for the public with a closed circuit television feed from the hearing room.[11] A greater logistical challenge will be posed by open hearings in non-administered proceedings which likely will not have access to cameras, separate rooms and other useful facilities. One can imagine the difficulty of holding open hearings in an arbitration held in a hotel conference room, including challenges concerning seating, security, how to go "in camera" for confidential testimony and the like.

ii. Publication of awards

NAFTA Article 1137 allows either disputing party to publish awards involving Canada or the United States.[12] The term "award" has been read broadly in this context to include interim, partial, procedural and final awards. This broad reading makes publication more comprehensive and more useful to the practicing Bar, and enhances transparency generally. Article 1137 provides that cases involving Mexico are

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7 UNCITRAL Rules, *supra* note 5, art. 25(4)

8 Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules), art. 39(2) [hereinafter ICSID Additional Facility Rules], *available at* http://www.worldbank.org/icsid/facility/facility.htm.

9 The U.S. and Canada announced their intention to consent to open public hearings at all Chapter 11 arbitrations to which either is a party following the 2003 NAFTA Commission Meeting. *See*, Department of Foreign Affairs and International Trade News Release No. 152, *NAFTA Commission Joint Statement*, (October 7, 2003), *available at* http://w01.international.gc.ca/minpub/Publication.asp?publication_id=380398&Language=E.

10 Mexico announced its support for open hearings in investor-state disputes following the 2004 NAFTA Commission Meeting. *See*, NAFTA Free Trade Commission Joint Statement, *Decade of Achievement*, (July 16, 2004), *available at* http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp.

11 A similar approach was used by the WTO in September, 2004 during the Panel's first meeting with the parties in the Beef Hormones case on September 12, 13 and 15, 2004. *See*, Communication from the Chairman of the Panels, *United States – Continued Suspension of Obligations in the EC-Hormones Dispute* & *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/8 & WT/DS321/8, 2 August 2005, *available at* http://www.wto.org/English/tratop_e/dispu_e/ds320-21-8_e.pdf.

12 NAFTA, *supra* note 4, art. 1137.

governed by the specific arbitration rules concerning publication of awards. UNCITRAL Rule 32 (5) and the former ICSID Rules require the consent of the parties to publish awards, although ICSID could publish excerpts of legal reasoning.[13] ICSID Rule changes proposed in May 2005 (and brought into effect in April 2006[14]) require mandatory publication of legal excerpts in view of the significance of such access for both the practicing Bar and for the development of cohesive jurisprudence.[15] In practice, all three NAFTA countries have extensive web sites with awards, submissions and other relevant materials.[16] Additionally, private lawyers such as Professor Newcombe at the University of Victoria and Todd Weiler have a large selection of Chapter 11 and other investment awards on their web sites.[17]

iii. Registration of disputes

An additional contribution to transparency derives from the various public registries of claims. Article 1126 (13) of NAFTA requires all parties to deliver notices of arbitration to the NAFTA Secretariat to be maintained on a public registry.[18] Similarly, the practice of ICSID is to list current cases on its web site with basic information about new cases registered with ICSID.[19]

iv - NO GENERAL PRINCIPLE OF CONFIDENTIALITY

An on-going debate under various arbitral rules has been whether they establish a general presumption of confidentiality for the process. This has been expressly addressed under NAFTA Chapter 11. In 2001 the NAFTA Parties concluded their first Chapter 11 Note of Interpretation which affirmed that there was no general or residual presumption of confidentiality in Chapter 11 disputes.[20] As a result, any claim of confidentiality must be based on a specific procedural order or rule of law. This simple rule further enhances transparency and focuses disputing parties on the specific basis for a claim not to disclose information.

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13 Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (May 12, 2005) at 9, *available at* http://worldbank.com/icsid/highlights/052405-sgmanual.pdf.

14 UNCITRAL Rules, *supra* note 5, art. 32(5); ICSID Convention, Regulations and Rules (as Amended and Effective April 10, 2006), Part F, ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID/15, R. 48(4) [hereinafter ICSID Arbitration Rules], *available at* http://www.worldbank.org/icsid/basicdoc/basicdoc.htm; ICSID News Release, *Amendments to the ICSID Rules and Regulations* (April 5, 2006), *available at* http://www.worldbank.org/icsid/highlights/03-04-06.htm.

15 *Suggested Changes to the ICSID Rules and Regulations, Supra* note 13, at 11.

16 International Trade Canada, http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp; US Department of State, http://www.state.gov/s/l/c3439.htm; Mexico's Ministry of the Economy, http://www.economia-snci.gob.mx/ls23al.php?s=18&p=1&l=2.

17 Investment Treaty Arbitration Resource Website, http://ita.law.uvic.ca/; NAFTA Claims, http://naftaclaims.com/.

18 NAFTA, *supra* note 4, art. 1126.

19 ICSID Cases, http://www.worldbank.org/icsid/cases/cases.htm.

20 Canada's Trade Negotiations and Agreements: NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

E. Going forward on open process

There is significant acceptance of transparency by tribunals and disputing parties in NAFTA Chapter 11 proceedings. It is fair to say that openness is now the norm in these hearings. The key initiatives developed under Chapter 11 have been memorialized in the model investment treaties of Canada and the United States. For example, Article 38 of the Canadian Model FIPA provides for open hearings with protection of confidential information, and for publicly available awards.[21] Article 29 of the U.S. Model BIT of 2004 is similar.[22] In fact, the transparency initiatives of Chapter 11 are now being incorporated into NAFTA Chapter 20 State-to-State dispute settlement.[23] The challenges for the future under Chapter 11 will likely relate to the actual implementation of these transparency initiatives. For example, will there be public access to document production? How does disclosure under freedom of information legislation relate to arbitral transparency?[24] What facilities are necessary to provide adequate access and who pays for these? These are the types of pragmatic questions are still to be resolved in upcoming cases.

F. Third party participation

Third party participation is also usually discussed under the rubric of transparency. In the NAFTA context this refers both to "non-party" or amicus submissions and to Article 1128 submissions by the non-disputing State Parties. Amicus participation raises concerns somewhat more complex than does open hearings and publication of awards. This is because amicus participation has greater potential to affect the scope, complexity and length of an arbitration, in turn increasing the cost of the arbitration.

NAFTA Chapter 11 has been a testing ground for amicus submissions in investor-State arbitration. The question of whether amicus was available in Chapter 11 arbitrations was first raised in the *Methanex* case, which held that Rule 15 of the UNCITRAL Rules included the right to make amicus submissions.[25] Rule 15 is one of the foundational provisions of the UNCITRAL Rules and essentially provides that all parties are to be treated with equality and to be allowed to present their case. The right to file amicus briefs is not expressly set out in Rule 15, and hence the *Methanex* tribunal heard vigourous arguments about whether it was authorized by that provision. Canada and the United States argued that amicus was

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21 Canada's Foreign Investment Protection and Promotion Agreement Model, *supra* note 6, art. 38.

22 US Model Bilateral Investment Treaty, *supra* note 6, art. 29.

23 Chapter 20 awards are available on the NAFTA Secretariat website: NAFTA Secretariat, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76.

24 The issue of how freedom of information legislation relates to arbitral confidentiality has proven contentious in several Chapter 11 cases. The *Pope & Talbot* view on the issue differed from that presented in the *Loewen, Mondev* and *UPS* cases. *See* Pope & Talbot Inc, v. Canada, *Procedural Order on Confidentiality No. 5*, (Dec. 17, 1999), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc5.pdf; *See also, Pope & Talbot Inc, v. Canada*, Letter from the Tribunal, (Apr. 2, 2000), at para. 5, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc6.pdf; *See Loewen v. United States*, Decision on hearing of Respondent's objection to competence and jurisdiction, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001), at para. 26, *available at* http://www.state.gov/documents/organization/3921.pdf; *Mondev International Ltd. v. United States*, Award, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), at para. 29, *available at* http://www.state.gov/documents/organization/14442.pdf; *United Parcel Service of America Inc. v. Canada*, Procedural Directions and Confidentiality Order (April 4, 2003), at 5, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSOrderRefusingCanadaRequest.pdf.

25 *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, Jan. 15, 2001, at para. 31, *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf .

comprehended by Rule 15. Mexico and the claimant *Methanex* argued that the right to file an amicus submission was a substantive right that could not be read into a procedural provision such as Rule 15. Ultimately the tribunal held that Rule 15 permitted amicus participation. The *UPS* tribunal subsequently affirmed the views of the *Methanex* tribunal on this point.[26]

In October 2003 the three NAFTA Parties issued formal procedures outlining when amicus submissions ought to be accepted by tribunals in Chapter 11 proceedings and suggesting a procedure to obtain leave to participate as an amicus.[27] These procedures aimed at ensuring common expectations among disputing parties and amicus as well as a fair process. They have generally been followed to date and require a prospective amicus to file a request for leave to submit a brief, disclosure of the amicus' interest in the case and information on funding of the amicus. The NAFTA guidelines suggest four criteria for the acceptance of a non-disputing party brief. First, amicus participation must assist the tribunal in assessing the facts and legal issues by bringing a perspective to the proceedings different than that of the disputing parties. Second, the brief must address matters within the scope of the dispute. Third, the amicus must have a significant interest in the arbitration at hand. Fourth, the subject matter of the arbitration must contain an element of public interest.

Amicus participation has recently been allowed outside of the NAFTA Chapter 11 context. In *Aguas Argentinas v. Argentina* an ICSID tribunal permitted amicus submissions.[28] The *Aguas Argentinas* case employed reasoning similar to that of the *Methanex* tribunal, which had been decided under NAFTA and the UNCITRAL Rules. The *Aguas Argentinas* decision reasoned that amicus submissions could be accepted since the issue was a question of procedure rather than substantive law. The tribunal went on to discuss certain concerns regarding the burden this could impose on other parties. In deciding whether to accept submissions from an amicus, the tribunal looked to criteria similar to those elucidated in NAFTA Chapter 11 proceedings. First, it assessed the appropriateness of the subject matter for non-disputing party input. Second, it assessed the suitability of the applicants to act as amicus to the tribunal. Third, it considered whether or not the submissions addressed issues related to the public interest. The tribunal also refused a broad request for access to all documents in the arbitration.

Non-disputing party participation continues to arise in NAFTA investor-State arbitration. In *Glamis Gold v. United States*, the Quechan Indian Band recently acted as amicus to the tribunal to explain issues regarding the investor's mine location on lands sacred to the tribe.[29] The tribunal found that the Band's

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26 *UPS v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, Oct. 17, 2001, at para. 39, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf.

27 Guidelines for the animus process were issued by the NAFTA Parties as part of the *NAFTA Free Trade Commission Joint Statement*, "Celebrating NAFTA at Ten". *Statement of the Free Trade Commission on Non-disputing Party Participation* (NAFTA Free Trade Commission, October 7, 2003), *available at* http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf .

28 *Aguas Argentinas et al v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (May 19, 2005), *available at* http://www.investmentclaims.com/decisions/Aguas Argentinas-Argentina-Order-19May2005.pdf; The power of a tribunal to accept amicus briefs was as affirmed in a March 2006 order: *Aguas Provinciales de Santa Fe S.A. et al. v. Argentina*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/17 (March 17, 2006), at para. 16, available at http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf.

29 Decision on Application and Submission by Quechan Indian Nation, *Glamis Gold, Ltd. v. United States*, (16 September 2005), available at http://www.state.gov/documents/organization/53592.pdf .

submission satisfied the principles of the Free Trade Commission's Statement on non-disputing party participation.

G. Going forward on amicus

NAFTA Parties continue to build on their experience with amicus participation in investor-State arbitration. Canada's Model FIPA now addresses non-disputing party submissions at Article 39, and refers to the same considerations as in the NAFTA Guidelines on third party submissions.[30] Conversely, the U.S. Model BIT at Article 28 permits amicus submissions, but does not refer to the suggested NAFTA process.[31]

In the ICSID context, suggested Rule changes released in May 2005 permit tribunals to allow amicus participation after consulting with the disputing parties.[32] Several relevant considerations in granting such non-disputing party participation are suggested by ICSID. One consideration is whether the amicus would bring a perspective to the process which differs from that of the disputing parties. A second consideration is the intended scope of the arbitration. A third consideration is whether the amicus has a significant interest in the proceedings. A fourth consideration is whether such participation would impose an unfair burden on the disputing parties.

Practical experience with amicus participation in arbitration is limited. It appears that the participation of amicus does place some extra burden on parties to a dispute, at the least by having a further set of pleadings to address.[33] However, this burden does not seem overly large. At the same time, amicus submissions also do not appear to have been determinative to the awards rendered in any investor-State case to date. For instance, in the *Methanex* final award the tribunal noted that the amicus was useful, but the award did not make clear how (or if) the amicus submission had been applied.[34] Some analysts have expressed concern that amicus participation in the investor-State context has been exclusively pro-government and anti-investor. The author would suggest that this criticism is unfounded and that amicus participation has been from a variety of perspectives. Another concern is how to address amicus participation where there are numerous would-be amici, or where there is significant repetition among submissions.

H. Role of non-disputing states in investor-state dispute settlement

A "non-disputing State" refers to a State whose measure is not at issue in a dispute. For example, in a NAFTA claim against Canada, a non-disputing State would be the United States or Mexico. A current question is whether the non-disputing State properly has a role in an investor-State case and whether they should intervene and offer guidance to the tribunal. A review of the issue suggests that such States do have a useful and legitimate role to play in such disputes.

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30 Canada's Foreign Investment Protection and Promotion Agreement Model, *supra* note 6, art. 29; *Statement of the Free Trade Commission on Non-disputing Party Participation*, *supra* note 26, art. 6.

31 US Model Bilateral Investment Treaty, *supra* note 6, art. 28.

32 *Suggested Changes to the ICSID Rules and Regulations*, *Supra* note 13, at 11.

33 *See* Martin Hunter & Alexei Barbuk, *Non-Disputing Party Interventions in Chapter 11 Arbitrations*, *in* INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPRECTS, 151, 153 (Todd Weiler, ed., 2004).

34 *Methanex Corp. v. United States*, Final Award, August 3rd, 2005, at para. 11, *available at* http://www.state.gov/documents/organization/51052.pdf .

The first and most obvious reason for non-disputing States to participate is that they are party to the treaty that is being interpreted. As such, these States have the experience of having negotiated the treaty and have a unique perspective on how the treaty should be interpreted.

Second, non-disputing States' participation in disputes also derives legitimacy from the fact that these States are the only disputants with obligations under investment treaties: investor-claimants have no treaty obligations, will never be sued under the treaty and will never have to comply with the treaty. A claimant in a dispute is engaged in a "one-off" event, while State Parties are not. State Parties undertake treaty obligations and must continually ensure their measures comply with such obligations. They are liable in damages if their measures do not comply. States thus may be subject to numerous challenges and will be living with and interpreting the treaty obligations at issue in numerous contexts for many years to come. As well, investor-State disputes are often challenges to the public policy of governments, and potentially are broader in impact in terms of their effects on citizens and government than is a decision in a commercial arbitration between private parties.

Third, a State Parties' interest in disputes is not just defensive. Rather, States have a compelling interest to ensure that an investment treaty actually provides investor protection and promotes foreign investment in the host State. Investment protection and promotion is the *raison d'être* for States' entrance into such treaties and thus States have an interest in seeing that BITs are interpreted coherently, logically and consistently. Consistency in BIT interpretation is especially key because there is no formal system of *stare decisis* or precedent within this treaty regime. The credibility of the entire investor-State dispute settlement system is undermined when irreconcilable decisions are issued. While such incidents are infrequent, there have been recent controversies such as that resulting from the issuance of conflicting awards in the two *CME* cases.[35] Similarly, considerable commentary resulted from the differing interpretations of the umbrella clause in the *SGS* cases.[36] As this type of conflict affects the overall credibility of the system, States have an interest in avoiding it if possible. State party participation is one way that States can ensure cohesive jurisprudence and the continued integrity of the arbitral system.

NAFTA Chapter 11 contains an innovative vehicle to give the non-disputing State a voice in proceedings under this Chapter. Under Article 1128, States have a right to make submissions on a question of NAFTA interpretation.[37] There are also complementary provisions in Articles 1127 and 1129 which provide that a non-disputing State may receive notice of claims and copies of pleadings. These provisions saw much use in the early days of Chapter 11, and remain valuable, although they are less frequently employed of recent.

Several legal issues related to the application of Article 1128 deserve mention. First, Article 1128 does not expressly outline a procedure for non-disputing State participation. Tribunals have therefore developed the requisite processes and have invariably allowed other State Parties to be present at the hearing. Tribunals have welcomed submissions by non-disputing States, usually in writing. Second, also of note is the scope of Article 1128. The Article allows non-disputing Party participation relating to the interpretation of NAFTA, and not as a vehicle to address specific facts. NAFTA Parties have thus far

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35 *See* Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties have a Bright Future* 12 U.C. Davis J. Int'l L. & Pol'y 47, 60 (Fall 2005).

36 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (January 29, 2004), *available at* http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/13, (August 6, 2003), *available at* http://www.worldbank.org/icsid/cases/SGS-decision.pdf.

37 NAFTA, *supra* note 4, art. 1128.

disciplined themselves on this point and have limited themselves to treaty interpretation. A third legal issue of note is the open debate which exists regarding the effect of all three NAFTA Parties' agreement on the interpretation of a provision. While such agreement is clearly persuasive, it is undecided whether or not it constitutes a "practice" for the purposes of Article 31 of the *Vienna Convention on the Law of Treaties.*[38]

Questions have emerged regarding whether there is a broader scope for non-disputing parties (amicus) to participate in an arbitration than is offered to non-disputing NAFTA States under NAFTA Article 1128.[39] Article 1128 would appear to limit participation by non-disputing NAFTA States to input on questions of law, and it is unclear whether such States would be permitted to offer submissions on facts. On the other hand, it appears that non-State parties would be permitted to offer submissions on questions of both fact and law.

Non-disputing State participation such as that facilitated by NAFTA Article 1128 has been criticised by some investor lawyers as a "piling on" of government arguments that provides an unfair advantage to the respondent State in a dispute. These practitioners argue that States will always agree with one another and are trying to take advantage of strength by numbers. While the State Parties to a treaty often agree on issues of its proper interpretation, this is not always the case, as was evident in the *Methanex* case on the amicus issue.[40] This critical view of non-disputing State participation likely reflects a commercial arbitration perspective where a clause such as Article 1128 is unheard of. It ignores the roots of such clauses which are frequently found in State-to-State dispute settlement provisions. Agreements framing State-to-State dispute settlement invariably contain similar clauses permitting some level of non-disputing State participation. For instance, NAFTA Article 2013 permits a non-disputing party to attend hearings and make submissions. Article 10 of the WTO Dispute Settlement Understanding permits any Member with a "substantial interest" to be heard and make submissions, an option which is especially useful during the Appellate Body stage.[41]

Non-disputing State participation has been incorporated into other treaties with an investor-State dispute settlement mechanism. Such participation was included in the OECD Multilateral Agreement on Investment.[42] It is currently foreseen in the US Model BIT at Article 28 and in Canada's Model FIPA at Article 35.[43] The CAFTA treaty contains a similar provision at Article 10.20.[44] Recently adopted ICSID

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38 Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

39 NAFTA, *supra* note 4, art.1128.

40 Mexico's views on this issue differed strongly from those of Canada and the United States. *See, e.g., Methanex Corp. v. United States*, Submission in Response to Application for Amicus Standing - Mexico, Nov. 10, 2000, *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexMexicoFirstSubReAmicus.pdf; *Methanex Corp. v. United States*, Submission in Response to Application for Amicus Standing - Canada, Nov. 10, 2000, *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexCanadaFirstSubReAmicus.pdf; *Methanex Corp. v. United States*, First Submission on Amicus Application - U.S.A., 27 October 2000, *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexUSFirstSubReAmicus.pdf.

41 Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, *available at* http://www.wto.org/English/docs_e/legal_e/28-dsu.pdf.

42 The MAI Negotiating Text as of April 1998 permitted non-disputing State participation in both the State to State and investor – State dispute resolution provisions. *See* The OECD Multilateral Agreement on Investment, April 1998, at 66 & 74, *available at* http://www.oecd.org/dataoecd/46/40/1895712.pdf.

43 Canada's Foreign Investment Protection and Promotion Agreement Model, *supra* note 6, art. 35; US Model Bilateral Investment Treaty, *supra* note 6, art. 28.

Rule changes also give discretion to tribunals to allow participation of non-disputing States.[45] Such changes, along with the inclusion of non-disputing State participation in other treaties and model agreements, reflect the fact that such participation is a useful and valuable tool in dispute settlement.

Conclusion

It seems a trite conclusion, but transparency is here to stay and most States have clearly acknowledged this. For example, the OECD Investment Committee has endorsed transparency and third party participation in these terms:

> There is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.[46]

The "big ticket" items of the transparency agenda such as open hearings, the accessibility of awards and amicus participation have already been accomplished. This has been made possible through tribunal interpretations of existing rules and agreements, statements on the issue by treaty Parties and through the practice of treaty Parties and relevant institutions. Going forward, express provisions guaranteeing openness are being adopted in treaties and applicable rules. Such transparency measures are too important not to be institutionalized. The Model FIPA and BIT, along with the parallel provisions in investment chapters in FTAs, promises to ensure that openness and access are guaranteed in the future.

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44 Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, at , *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

45 *Suggested Changes to the ICSID Rules and Regulations, Supra* note 13, at 11.

46 Statement by the OECD Investment Committee, June 2005 at: www.oecd.org/investment

See also OECD Report: "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, Working Paper on International Investment No. 2005/1, April 2005 at: www.oecd.org/investment